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No. 08-988

Supreme Court, U.S.
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# In The
# Supreme Court of the United States

MATTHEW HARRELL,

*Petitioner,*

v.

CITY AND COUNTY OF HONOLULU,
A Municipal Corporation, AARON MAHI, Sr., Director,
ROBERT LARM, and SANFORD MASADA,

*Respondents.*

**On Petition For A Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

## RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals correctly affirmed the District Court's disposition of the City's Motions in Limine, the Petitioner's objections to the composition of the jury pool and the jury, the denial of his motion for judgment as a matter of law, and the denial of his motion for a new trial.

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## STATEMENT OF THE CASE

The instant action is one in which relief was sought under 42 U.S.C. §§ 1981a 1983, 1985, 1986 and 2000e-3(a) for alleged employment discrimination on the basis of race.

Petitioner was unsuccessful at trial and now seeks to challenge various adverse District Court rulings. Specifically, Petitioner challenges the District Court's orders granting Respondent's motions *in limine* precluding certain evidence he sought to offer at trial. Petitioner also seeks review of the District Court's denial of his Motion for Judgment as a Matter of Law, which was determined to be procedurally barred under Rule 50 of the Federal Rules of Civil Procedure, and his Motion for a Mistrial, which was denied as untimely.

Petitioner's Motion for Mistrial was premised on his contention that there was inadequate African-American representation in the jury pool. This motion was made after the jury was sworn. Furthermore, Petitioner failed to provide any supporting evidence that the jury's composition did not fairly represent a cross-section of the Hawaii community.

Finally, Petitioner seeks to have overturned the jury's verdict upon the claim that no evidence was presented to support the verdict and asserts the District Court's failure to grant a new trial was an abuse of its discretion.

Petitioner's attempt to solicit this Court's review by reciting adverse rulings on evidentiary and procedural matters falls well short of the "compelling reasons" set forth in Rule 10 of the *Rules of the Supreme Court of the United States* required for the exercise of this Court's jurisdiction.

Petitioner contests the Ninth Circuit decision in which both the Majority and Dissent affirmed the evidentiary and procedural rulings of the Hawaii District Court. Petitioner's continued disagreement with the Ninth Circuit's application of law does not warrant the Court's attention and the petition for certiorari should be denied.

## STATEMENT OF FACTS

On September 20, 2000, the Royal Hawaiian Band held auditions for a permanent, full-time, solo bassoon player. Three individuals auditioned for the position: Christopher Ventura, Ryan Howe, and Plaintiff Matthew Harrell. The selection process had two components, a live audition and an interview. During the audition phase, each applicant played the same assigned piece of music. During the interview phase each applicant was asked the same set of questions. A selection panel composed of Respondents Aaron Mahi, the Band Master of the Royal Hawaiian Band, Sanford Masada, the Assistant Conductor, and Robert Larm, the Woodwind Section Supervisor, graded each applicant for the audition and the interview.

Thereafter, the applicants were ranked by their overall score. Of the three applicants, Petitioner Harrell was ranked last by the selection panel. Although Harrell's performance was deemed satisfactory in some respects, it was also significantly flawed. He missed a number of notes and his sound was off with air leakage, pitch wavering, and a lack of endurance. Harrell was also noticeably nervous, and appeared to be suffering from performance anxiety. Furthermore, unlike the other two performers, his music failed to exhibit the sort of "beaming" or "brightness" quality expected of a soloist.

The bassoonist position was offered to Christopher Ventura, the applicant with the highest overall score. When he declined the position, it was offered to Ryan Howe, the next highest ranked applicant, but he also declined the position. After the first two applicants declined, the Royal Hawaiian Band made no further offers and the position remained vacant.

Petitioner filed claims of discrimination and retaliation against the City and County of Honolulu, Mahi, Masada and Larm. On January 12, 2006, after a six (6) day trial, a jury found in favor of the City and the named Defendants.

Thereafter, Petitioner appealed to the Ninth Circuit. In a 2-1 opinion, the Court affirmed the rulings of the District Court and the jury's decision. Both the Majority and the Dissent affirmed the lower court's rulings on evidentiary and procedural matters and its denial of Petitioner's motion for judgment as a matter of law. In addition, the Majority found the

record contained ample evidence to support the jury's verdict. Consequently, it ruled that the jury's verdict was not against the weight of evidence and determined that the decision was not a seriously erroneous result. The Majority therefore concluded that it was not an abuse of discretion to deny the Petitioner's motion for a new trial. By contrast, the Dissent opined the jury verdict was not supported by the evidence and in fact stated that the record contained "no evidence" to sustain it. Therefore, the Dissent was of the opinion that the district court abused its discretion in denying the Petitioner's motion for a new trial.

## REASONS FOR DENYING THE PETITION

### A. There Was No Abuse of Discretion in the District Court's Evidentiary Rulings

#### (1) Motion in Limine No. 4

The City sought to exclude all testimony or evidence which pre-dated the Named Defendants' participation in the Administration of the Royal Hawaiian Band for reasons of relevance, confusion or misleading the jury and hearsay. The Petitioner sought to introduce a magazine article and a book which pre-dated the Administration of the Named Defendants. The District Court excluded the magazine article, and all but one page of the book. On appeal, the Ninth Circuit ruled the Petitioner failed to show the excluded material was relevant, and further, that nothing in the Petitioner's Brief or the

record suggested the excluded material had " . . . any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable that it would be without the evidence." Since the Petitioner had failed to show an abuse of discretion which resulted in a prejudicial error, the ruling of the lower court must stand. *E.E.O.C. v. Pape Lifts, Ins.*, 115 F.3d 676, 680 (9th Cir. 1997); *Heyne v. Caruso*, 69 F.3d 1475, 2478 (9th Cir. 1995).

**(2) Motion in Limine No. 8**

Petitioner challenges his preclusion from offering the testimony of two expert witnesses who were not properly disclosed as required by the District Court's Rule 16 Scheduling Order. Petitioner failed to designate the proposed witnesses as experts, failed to give their qualifications and failed to state the substance of their opinions. The Ninth Circuit found Petitioner had failed to follow court orders, and failed to comply with the expert disclosure requirements of F.R.C.P. 26. Therefore, it was not an abuse of discretion to preclude the testimony.

**(3) Motion in Limine No. 9**

Petitioner challenges the preclusion of hearsay statements contained in the complaints he filed with the Hawaii Civil Rights Commission and the Equal Employment Opportunity Commission. Petitioner sought admission of these documents as business and

public records under their respective exceptions to the hearsay rule. However, Petitioner failed to explain how these exceptions applied. Therefore, the court found no abuse of discretion.

### B. There Was No Error in the Denial of the Motion for Mistrial

Petitioner moved for mistrial on the issue of the jury's composition, complaining that it contained no African-Americans. However, the motion was made after *voir dire* had been conducted, peremptory challenges had been exercised, the jury had been sworn and the venire excused. The District Court ruled the motion was untimely and the Ninth Circuit agreed. This ruling comports with established law. *Dias v. Sky Chefs, Inc.*, 948 F.2d 532, 534 (9th Cir. 1991); *Morning v. Zapata Protein (USA), Inc.*, 128 F.3d 213, 216 (4th Cir. 1997).

The Petitioner's challenge to the composition of the jury was initially reviewed by the District Court on constitutional grounds under the Sixth Amendment and pursuant to the test under *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 668 (1979). Although African-Americans are a "distinctive" group in the community, Petitioner failed to meet the remaining two prongs of the *Duren* test which required him to prove: (1) that the representation of African-Americans in venires from which juries are selected was not fair and reasonable in relation to the number of such persons in the community; and (2) that this

underrepresentation was due to a systematic exclusion of African-Americans in the jury-selection process. Petitioner offered no proof of the last two requirements and the motion was denied. Both the Majority and Dissent in the Appeals Court agreed with this disposition.

Petitioner also raised the issue of exemption of military personnel from the jury selection process. Pursuant to 28 U.S.C. § 1863(b)(6), full-time active military personnel are excluded from jury service. This occupational class is exempted from jury duty due to the need for uninterrupted performance and this exclusion has been determined to be reasonable and critical for the welfare of the community. *Taylor v. Louisiana*, 419 U.S. 522, 534, 95 S.Ct. 692, 700 (1975); *Rawlins v. Georgia*, 201 U.S. 638, 640, 26 S.Ct. 560, 561 (1906); *Gov't of the Canal Zone v. Scott*, 502 F.2d 566, 568-569 (5th Cir. 1974).

The Ninth Circuit agreed with the lower court decision that the motion was untimely, without merit and that there was no abuse of discretion. *United States v. Allen*, 341 F.3d 870, 891 (9th Cir. 2003).

### C. There Was No Error in Procedurally Barring the Petitioner's Untimely Request for a Motion for Judgment as a Matter of Law

Rule 50 of the Federal Rules of Civil Procedure requires that a motion for judgment as a matter of law be made at the conclusion of the evidence and before submission of the case to the jury. *See Janes v.*

*Wal-Mart Stores, Inc.*, 279 F.3d 883, 886-887 (9th Cir. 2002) (holding that if no motion is made at the conclusion of the evidence and before submission to the jury, the movant has failed to meet the "procedural prerequisite" for a post-trial Rule 50 motion). Even if not timely raised, however, and a plain error has occurred such that the failure to review would mean a "manifest miscarriage of justice", the matter may be reviewed by the court to determine if "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party". F.R.C.P. 50(a)(1); *Herrington v. County of Sonoma*, 834 F.2d 1488, 1500 (9th Cir. 1988). Nevertheless, if there is an evidentiary basis for the jury's verdict, their decision stands. *Grant v. City of Long Beach*, 315 F.3d 1081, 1085 (9th Cir. 2002).

The District Court determined that a F.R.C.P. 50 motion had not been timely filed, and therefore, the Petitioner was precluded from consideration of a motion for judgment as a matter of law. The Ninth Circuit Majority and Dissent agreed with the lower court.

### D. There Was No Error in the Denial of Petitioner's Motion for New Trial

Petitioner contends the decision not to offer him a band position was subjective, biased and racially motivated. Petitioner challenges the denial of his motion for new trial, contending that the evidence was insufficient to support the jury's verdict.

Neither the District Court, nor the Appeals Court may order a new trial if the record contains evidence to support a jury's verdict. *Alford v. Haner,* 446 F.3d 935, 936 (9th Cir. 2006), citing, *Graves v. City of Coeur D'Alene*, 339 F.3d 828, 839 (9th Cir. 2003); *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1372 (9th Cir. 1987). The standard of review is one of abuse of discretion. When the motion is based on the insufficiency of the evidence, it is considered a "strict standard". *Venegas v. Wagner*, 831 F.2d 1514, 1519 (9th Cir. 1987). Even where a Court might have come to a result different from the jury, if evidence exists in the record to support the verdict, it must stand and the motion for new trial must be denied. *E.E.O.C. v. Pape Lift, Ins.*, 115 F.3d at 680.

An adequate evidentiary basis exists in the record here to support the jury's verdict. The jury heard the evidence, observed the testimony of both Petitioner and Respondents, listened to the audition performance tapes of the three applicants, and considered the expert testimony submitted by both Petitioner and Respondents.

There was substantial testimony that the Petitioner's audition performance was flawed in numerous respects and that Petitioner was the least qualified among the applicants. Specifically, Petitioner missed a number of notes and his sound was noticeably off with air leakage, pitch wavering, and a lack of endurance. The panelists also testified that, unlike the other auditioners, Petitioner was noticeably nervous and that his tone failed to exhibit the sort

of "brightness" or "beaming" quality one would expect of a soloist. Finally, both experts agreed that the candidates had been ranked appropriately, that Petitioner exhibited nervousness and that his performance was flawed. Consequently, the jury's determination, after weighing the evidence, that Respondents did not engage in unlawful discrimination cannot be deemed "seriously erroneous". *E.E.O.C. v. Pape Lift, Ins.*, 115 F.3d at 680.

The Dissent at the Court of Appeals cited *Norris v. City and County of San Francisco*, 900 F.2d 1326, 1330 (9th Cir. 1990) as authority for its position that, once qualified, it is inconsistent and a pretext to reject an applicant as not being qualified if the "employer's explanation is unworthy of credence." 283 Fed.Appx. 509, 514 (Rawlinson, J., dissenting). Because it was "convinced that the employer's claim that Harrell was unqualified [was] not supported by the record", the Dissent opined that "the record d[id] not support the jury's finding of no discrimination." *Ibid.* Therefore, the Dissent stated there was an abuse of discretion in the denial of the motion for new trial. *Id.*

The standard set forth in *Norris* is more rigorous than portrayed by the Dissent, and *Norris* itself is easily distinguishable from the instant case. *Norris* involved a situation in which an applicant for a cable

splicer position[1] took a test for it, was deemed qualified and ranked third in a list of applicants and was subsequently denied the third position on three different occasions. The employer's purported justifications changed over time, included acquired-after data and directly conflicted with its practice in a contemporaneous promotion. *Norris* at 1330-31. Nevertheless, the Court ruled that the District Court needed to establish findings in a "sufficiently clear and explicit" manner to address whether the "employers' asserted rationale[s] . . . were so implausible as to be unworthy of credence" and remanded the case to the district court. *Norris* at 1329, 1330, *respectively*.

Unlike *Norris*, a lower scoring applicant was not selected over Petitioner and the rationale offered for his nonselection was neither implausible nor unworthy of credence. Petitioner's own witnesses concurred in the rankings made and the flawed nature of his performance. The jury also heard testimony concerning the expectations and responsibilities of a soloist and were repeatedly told about Petitioner's performance anxiety problems. Furthermore, they learned of a badly flawed solo performance by the Petitioner while previously playing part-time with the Royal Hawaii Band. Conjecture as to why the jury reached its decision only serves to underscore the fact that

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[1] Respondent would note the selection process for a Solo Bassoonist involves factors of musicianship which are more subjective in nature than the cable splicer position in *Norris*.

there was evidence to support the verdict. Only if there was *no evidence* may consideration be given to overturning the denial of the motion for new trial. Clearly, that is not the case here.

## CONCLUSION

None of the issues raised by the Petitioner meet the considerations governing review on certiorari set forth in Rule 10, of the *Rules of the Supreme Court of the United States* for the exercise of this Court's jurisdiction. Nothing in this Appeal raises any issues of conflict with decisions of other United States Courts of Appeal. The decisions and rulings of the lower court are consistent with well-established existing law, civil rules of procedure and evidentiary rules. Therefore, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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